APPENDIX

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
OFFICE OF ALIEN PROPERTY

In the Matter of:
HANNAH VON BREDOW, ET AL.

Title Claim No. 42152

Docket No. 54 T 70

Recommended Decision of Harry R. Hinkes, Hearing Examiner

STATEMENT OF THE CASE

This is a proceeding for the return of property under section 32 of the Trading with the Enemy Act, as amended (50 U.S.C. Appx. 32), conducted in accordance with the Rules of Procedure for Claims under the Trading with the Enemy Act, as amended (20 Fed. Reg. 7529).

By Vesting Order No. 441, dated December 4, 1942, and amended September 10, 1943, this Office vested the interests of Hannah von Bredow (hereinafter referred to as the claimant), and her children, Marguerite, Alexandra, Diana, Philippa Maria, Herbert and Leopold Bill, in and to certain property held in trust by the Union Trust Company of Washington, D. C., as Trustee under an agreement dated March 11, 1940, executed by and between Waldemar Leopold von Bredow, Hannah von Bredow and said Trust Company. Notices of Claim were filed by the claimant and her children on April 6 and April 9, 1949, in which the value of claimed property was estimated to be $350,000. Pursuant to notice, a hearing was held before George W. Carr, Hearing Examiner, on April 20, 1954. Messrs. Chisman Hanes and Michael A. Schuchat, of Klagsbrunn, Hanes and Irwin of Washington, D. C., appeared for the claimant and her children. Mr. William K. Jackson appeared for the Chief of the Claims Section. The record consists entirely of documentary evidence, in-

cluding statements of the interested parties and witnesses. No oral testimony was presented. Proposed findings and extensive briefs were filed by the parties. On December 11, 1955, the claim was reassigned to me for recommended decision.

Proposed Findings of Fact

From the entire record, I find:

1. The claimant, Hannah von Bredow, and her seven children were German nationals and were present in that country during the period beginning December 7, 1941, and ending March 8, 1946.

2. The claimant and her children were communicants of the Evangelical (Protestant) Church in Germany.

3. Protestantism arose in Germany in the Sixteenth Century, following the Reformation. From the beginning, Lutheranism had a national cast—the local German prince was to determine the religion of his principality. He, in turn, delegated the power of church government to ministers of State and consistorial officers whom he controlled. With the creation of the German Republic after World War I, an effort was made to sever the traditional bonds between Church and State. Only partial change was achieved, however. Local congregations were allowed the right of self-administration, but the legal sovereignty of the State and its supervision of church laws were recognized.

4. In 1933, using the Reichstag fire as the justification, Chancellor Hitler obtained a decree from President von Hindenburg suspending the constitutional guarantees of free speech, free press, rights of assembly, rights of privacy in communications, etc. Religious freedom, also guaranteed by the Weimar Constitution, was not suspended by the presidential decree. In fact, Hitler's Reichstag speech of March 23, 1933, assured the Church that its rights were not to be infringed.

5. The Nazi Party was always predominantly anti-Christian in its ideology. National Socialism was considered the ultimate substitute for Christianity. Under the Nazis, the content of Christianity was only what National Socialism chose to allow.

6. The strategy against the Protestants wes designed to unify the numerous sects into a single national church responsive to the will of the State. That group in the Protestant Church which responded to the Nazi demands that the Church be subordinated to the State called themselves "German Christian" (*Deutsche Christen*) and was able to secure the election of a Nazi as Reich Bishop (July 14, 1933, RGB1. I/471). The opposition within the Evangelical Church became known as the Confessional Church (*Bekenntnis-Kirche*).

7. In 1933, the entire religious press of Germany was put under State control (*Law Concerning Editors*, December 1933).

8. Under the Nazified control of the Evangelical Church, the 700,000 members of the Evangelical Youth Movement were transferred to the Hitler Youth in 1933.

9. On January 4, 1934, the Reich Bishop forbade pastors from mentioning the controversy between the "German Christians" and the Confessional Church.

10. On November 5, 1934, the *Law Concerning the Regulation of Public Collections* (RGB1. I/1086), subjected public collections to State approval. The Confessional Church, held to be an illegal nonconformist group by a German court decison in 1937, was denied exemption from the Collections Law, restricting the fund-raising efforts of that Church.

11. On November 6, 1934, the Minister of the Interior prohibited all discussion of the Church question in the press, pamphlets or books.

12. The hiring of rooms for any kind of church meetings was banned in 1934.

13. In March 1935, the Prussian State Government assumed control over the Evangelical Church in Prussia. *The Fifteenth Decree for the Execution of the Law for the Safeguarding of the German Evangelical Church* of June 26, 1937 (RGBl. I/697), did a similar thing for all Germany.

14. In June 1935, the Church was denied access to the civil courts on church suits which were then transferred to a special tribunal (*Beschlusstelle*) in the Ministry of the Interior (*Law Concerning Procedure for Decisions in Legal Affairs of the Evangelical Church,* RGBl. I/774; *First Ordinance for Execution of the Law,* RGBl. I/851). This function was later transferred to a Minister for Religious Affairs (RGBl. I/1029, July 16, 1935; RGBl. I/1178, September 24, 1935).

15. On July 20, 1935, the Minister of the Interior issued instructions to the Gestapo that Confessional youth organizations were forbidden to wear uniforms or insignia or engage in outdoor sport activity.

16. In October 1935, the Propaganda Ministry imposed a censorship before publication on all church periodicals.

17. In 1937, many Confessional pastors were arrested for their outspoken criticism of the Nazi Government. Such prosecution, however, was in accordance with laws promulgated as early as December 10, 1871, and February 26, 1876 (RGBl. 28), which restricted the clergy from discussing matters of state in a manner endangering public peace.

18. Confessional theological schools, set up in contravention of a German decree of 1935, were closed in 1937 by police order pursuant to an anti-Communist law of 1933 (February 28, 1933, RGBl. I/83).

19. Radio broadcasting of all religious services was banned in 1939.

20. In 1939, the right of a parish to choose its own pastor was abolished, the control being lodged in a Nazi-dominated consistory.

21. Just before World War II started, 95 percent of the German people belonged to one of the two Christian Churches. Much more than half of the German population belonged to the Protestant Church; of the Protestant clergymen, only 747 of the 5300 ministers of the Church of Old Prussia were Nazi "German Christians"; in the Rhineland, only 130 of 800 ministers were "German Christians."

22. With the outbreak of World War II, more repressive measures against the Church were taken. Denominational schools were closed; religious instruction in schools was curtailed; the printing of new Bibles was forbidden; the religious press was completely suppressed; church property was taken over for government use; state aid in the collection of church taxes was ended; ministry candidates were required to register their non-Confessional attitude; clergymen were drafted for military service in large numbers; processions and pilgrimages were forbidden.

23. Although the organization of the Confessional Church had practically become non-existent with the war, many Confessional pastors went on with their spiritual work, wherever possible. The Confessional Church carried on its Bible studies, lectures, confirmation classes and children's service. Under the stress of continuing war, Nazi religious policies were increasingly determined on the basis of expediency, and, as the Nazis suffered military reverses, more and more Germans returned to the Church.

24. Although many officials of the Confessional Church were imprisoned, restricted in movement or otherwise

persecuted for their resistance and opposition to the Nazi dictates, the record contains only one reference to such treatment accorded a non-official member of that church. Although various reasons are given for the matter, it appears most likely that that person, Prof. von Dietze, conducted a secular divine service after the Nazi ecclesiastical authorities had prohibited church services and was thereupon arrested by the authorities.

25. Throughout the Nazi regime, claimant was a courageous and faithful communicant of the Confessional Church, and instilled a similar spirit within her children.

26. Claimant and her children attended the Holy Ghost Church (*Heiligengeistkirche*) in Potsdam. When the Confessional pastor was replaced by a "German Christian," they attended another Confessional Church in Potsdam. The Garrison Church, although Confessional, was not molested and was attended by the claimant also. Claimant's church attendance was regular; the services, though unadvertised, were open to the public and were never forcibly stopped or specifically banned. In addition to the religious services on Sunday, the Church held Bible and confirmation classes and the customary ministrations were performed. As claimant's children became of age, each was confirmed, even during the war years. Although claimant made generous contributions to the Church (in violation of Nazi law), and took an active part in Church matters, she never held any official position in the Church.

27. Claimant's Confessional Church was denied fuel for heating when World War II broke out. The Garrison Church had no heat after 1942. All churches, even "German Christian" Churches, were unheated after 1943. Clandestine evening church meetings were held in other buildings which had been heated during the day.

28. Claimant's children were educated in private schools. Marguerite entered Berlin University in 1934, studied

medicine, and was a practicing physician during the war. Alexandra and Diana entered the Kaiserin-Augusta-Stiftung in 1930 and completed their course of study in 1937 and 1938, respectively. Philippa entered the same school in 1934 and finished in 1941, and Maria attended from 1935 to 1944. None of the five daughters was obliged to join Nazi youth organizations. Marguerite satisfied the authorities by working on a farm; Alexandra and Diana were exempted because they were in their last year of study when it became obligatory to join the organizations (1937); Philippa and Maria were excused for medical reasons. Herbert and Leopold Bill attended private schools between 1934 and 1942. Leopold Bill never joined any Hitler youth organization while Herbert was excused from serving for medical reasons.

29. None of claimant's children's, aside from Marguerite, applied for admission to a German university; none was refused such admission.

30. Membership in the Nazi youth organizations was generally a prerequisite to admission to a German university after 1937. Exceptions to this rule were made, for example, when the applicant had been unable to join such organizations for physical reasons. Exception would have been granted, therefore, to each of the claimant's children (who did not enter any university) had they applied for admission, since Philippa and Maria had been excused from joining those organizations for medical reasons, and Alexandra and Diana were exempt because they were in their last year of preparatory study in 1937. Leopold Bill and Herbert were too young to attend a university during the war.

31. After finishing her studies at the Kaiserin-Augusta-Stiftung, Philippa attended a Berlin language school. In 1943, when ordered to work for the government in occupied France, she managed to satisfy the authorities by obtaining a job in a Berlin airplane firm.

32. Claimant was publicly and vigorously anti-Nazi. She refused all requests to join the Nazi Party. She did not permit her children to join Nazi youth organizations. She refused to fly the swastika. She refused to christen a battleship named for her grandfather, German Chancellor Bismarck. She helped Jewish friends and compulsory French laborers. She refused to transfer her property in the United States to Germany. She maintained a friendly interest in foreign anti-Nazi publications and broadcasts. She and her children distributed anti-Nazi literature. Their house was a meeting-place for many people who were against Hitler and plotted his assassination.

33. Claimant was under surveillance by the Nazis soon after they came into power. A dossier concerning her and her children was maintained by the Government.

34. Early in the Hitler reign, claimant made plans to leave Germany, but stayed when the authorities threatened to molest her mother.

35. Claimant was interrogated by the Nazis a number of times, and on many of these occasions, was questioned about her membership in the Confessional Church.

36. Claimant visited England and Switzerland in 1936.

37. In 1936, claimant was questioned by the authorities about an anti-Nazi group and was threatened with arrest in anonymous after-midnight phone calls.

38. In 1937, after making critical remarks in Austria about the Nazis, claimant was met at the railroad station by Gestapo agents who accompanied her to her home where she was questioned at length.

39. In 1937, claimant's passport was taken by the authorities because she had been accused of attempting to smuggle money into Switzerland to start a resistance movement there. The passport was returned to claimant in May 1938.

40. In 1941, claimant visited Rome. In 1942 and 1943, she visited Switzerland as did her seven children.

41. In August 1944, claimant went to Switzerland with Maria, Herbert and Leopold Bill.

42. Marguerite, Diana, Philippa and Alexandra were arrested by the Nazis in August 1944, because of their alleged complicity in the unsuccessful attempt on Hitler's life in July. Marguerite was released immediately because her skills as a physician were needed but she was required to report to the Gestapo daily. Diana and Alexandra were held, in part, as hostages to force claimant's return to Germany. They were released in November only after the claimant had returned from Switzerland with Maria. Maria was then sent to a labor camp from which she was released in March 1945. Because of the poor state of her health, claimant was not imprisoned but hospitalized immediately upon her return. At the hospital, she was interrogated by the Gestapo repeatedly. In December 1944 claimant was discharged from the hospital without arrest. Claimant was offered Philippa's freedom if she would renounce her family's allegiance to the Confessional Church, but she refused. Philippa remained in jail until April 1945.

43. A third son of claimant, Wolfgang, served in the German Army until March 1945 when he was reported missing in action. He is presumed dead, leaving no issue. His next of kin are his mother, brothers and sisters.

Discussion

Persons resident within Germany during the war are, by definition, enemies under the Trading with the Enemy Act, and, therefore, not entitled to the return of property vested by this Office. They may, however, be eligible for a discretionary, administrative return of the property pursuant to section 32 of that Act, provided they

satisfy certain tests prescribed therein. Under section 32(a)(2)(D), a German national must prove that

> as a consequence of any law, decree or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, [he] has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation.

Claimant stresses her experiences as a member of the Confessional Church as indicating denial of full rights of citizenship. She points to her repeated interrogations by Gestapo officials, her forced transfers from one Confessional Church to another to avoid "German Christian" pastors, her Church's lack of fuel for heating. She further cites her experiences resulting from her anti-Nazi stand: the temporary forfeiture of her passport in 1937-1938; the anonymous threatening phone calls during nights; more interrogations, even while hospitalized, by the Gestapo; the arrest and imprisonment of several of her daughters in 1944; her forced return from Switzerland and "hospital-arrest" thereafter; the social ostracism she suffered.

It is clear that the loss of civil rights contemplated by this section of the Act must be continuous, throughout the period of hostilities, and must be substantial. *Matter of Sztankay*, Docket No. 552, Title Claim No. 4240, decision of the Director dated February 26, 1954; *Matter of Mencke*, Docket No. 53 T 750, Title Claim No. 26392, decision of the Deputy Director dated August 4, 1955; *Matter of Alix Schmidt*, Docket No. 1083, Title Claim No. 46043, decision of the Chief Hearing Examiner dated March 20, 1952, pet. rev. den. August 1, 1952. The discomforts suffered by the claimant and her family throughout the war years were not the ones contemplated by Congress when it provided

for the return of property to those whose civil rights had been reduced *substantially*. Senate Report No. 1839, 79th Congress, 2d Sess., p. 12. Even if the arrest of the claimant and her children in 1944 were considered a substantial loss of civil rights, it took place late in the war and has no retroactive effect for the period 1941-1944. The Nazis' interference with claimant's religious life, strongly urged by her as a substantial deprivation of her civil rights, did not, however, prevent her regular church attendance, nor deprive her of the usual ministrations of the Church. In fact, the Confessional Church carried on its Bible studies, lectures, confirmation classes and children's services all through the war.[1] Moreover, claimant's freedom to travel outside Germany, even during the war, is inconsistent with her claim of persecution.

I need not elaborate further on this aspect of the claim, for even if the claimant failed to enjoy full rights of citizenship throughout the war, it must be shown that this failure was the result of German laws discriminating against a racial, religious or political group. In this connection, claimant has arrayed an impressive list of laws and governmental decrees which are claimed to be directed against the Confessional Church of which she was an active member. That the Confessional Church provoked the displeasure of the Nazis cannot be denied. An examination of the laws cited, however, does not demonstrate the alleged discrimination. Thus, the *Law Concerning Editors* (Finding No. 7), the 1943 decree of the Minister of the Interior (Finding No. 11), the prohibition against hiring of rooms for church meetings (Finding No. 12), the 1935 pre-publication censorship of church periodicals (Finding No. 16), the prohibition of radio broadcasting in 1939 (Finding No. 19) and the repressive measures detailed in Finding No. 22, were of general

[1] 165 The Fortnightly 266 (1946).

applicability, affecting all churches in Germany, rather than discriminatory towards any group. Other official acts, such as the transfer of the Evangelical Youth members to the Hitler Youth (Finding No. 8), the control of the Evangelical Church by the State (Finding No. 13), the denial of access to the civil courts (Finding No. 14), the banning of certain youth activities (Finding No. 15), the closing of Confessional theological schools (Finding No. 18), and the control of the choice of a pastor for a parish (Finding No. 20), although in terms directed against the Confessional Church, were totalitarian applications of the Nazi domination of all religious life. These were not measures discriminating against a religious minority, favoring a majority who behaved differently. These were but symptoms of the Nazi plan, first to control all religion, and then to subordinate it to the State.

> Fascism which mobilizes the total human personality in the interests of the power of the state cannot accept the principle of independent religious direction of the individual. It cannot accept the basic tenets of the Christian Church which consider God as the highest authority and individuals as His children with equal rights. Fascism and Christianity are therefore basically incompatible.
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> Under Fascism the state comes first and if religion conflicts with the State, so much the worse for religion.[2]

The attack upon religion by the Nazis is revealed, not so much by official acts and laws which the Nazis used, but by statements of leading officials. Thus, the Reich Minister for Church Affairs, Dr. Kerrl, declared:

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[2] *Fascism in Action*, Legislative Reference Service, Library of Congress (1947) p. 187.

> There has now arisen a new authority concerning what Christ and Christianity really is. This new authority is Adolf Hitler.[3]

Hitler's *Mein Kampf* was expected to supersede the Bible for religious purposes. It would be propounded and interpreted by National Church "orators" rather than priests or ministers. The Cross would be replaced by the Swastika and Germanic substitutes would take the place of Christian ceremonies and holidays. Martin Bormann, Hitler's Deputy Fuehrer, said in a secret decree of the Party chancellery distributed to all Gauleiters June 27, 1941:

> . . . A differentiation between the various Christian confessions is not to be made here. . . . Just as the deleterious influences of astrologers, seers and other fakers are eliminated and suppressed by the State, so must the possibility of church influence also be totally removed . . .[4]

As Justice Robert H. Jackson, Chief of Counsel for the United States in the Nurnberg War Crimes Trials, stated in his opening address on November 21, 1945:

> . . . The Nazi Party always was predominantly anti-Christian in its ideology . . . To remove every moderating influence among the German people and to put its population on a total war footing, the conspirators devised and carried out a systematic and relentless repression of all Christian sects and churches.[5]

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[3] Id., p. 189.

[4] *Nazi Conspiracy and Aggression*, Vol. I, U.S. Government Printing Office, Washington, D. C. (1946), p. 264.

[5] Id., p. 131.

In May 1942, Cardinal Faulhaber closed his report to the Vatican, saying:

> Today it is a question of life or death for Christianity, for in its blind rage against religion the Nazi "faith" does not or cannot distinguish between Protestantism and Catholicism.[6]

It is thus apparent that the repression experienced by the Confessional Church in Germany was only part of the over-all loss of religious freedom and independence inflicted by the Nazi regime upon all Germany. Although the right of religious freedom was not suspended by presidential decree in 1933, as were the rights of free speech, free assembly and free press, religious freedom was just as effectively destroyed by the official acts of the Nazis, despite any constitutional barriers to such deprivations. Any opposition to state control of free speech would provoke retaliation and punishment; similar opposition to the control of religion, such as was voiced by many of the Protestant and Catholic clergy, produced similar results. Despite such persecution, more than 95 percent of the German population continued to belong to the two Christian Churches.[7] If the denial of religious freedom to the Christians of Nazi Germany be deemed a denial of full rights of citizenship, then it must follow that 95 percent of the German populace were made eligible for the return of their vested property by the terms of section 32(a)(2)(D) of the Trading with the Enemy Act. This conclusion is no more reasonable than to conclude that the loss of free speech is a denial of civil rights, and since all Germans suffered that deprivation, all Germans are therefore entitled to the return of their vested property. Congress, in formulating section 32, obviously had in mind a persecuted minority whose lot was substantially less

[6] *Fascism in Action*, op. cit. p. 191.

[7] Herman, *Rebirth of the German Church* (1946), p. 45.

favorable than the bulk of the German population. It knew that all Germany had been living under an oppressive and stifling dictatorship where freedoms were the exception, not the rule. If the civil rights lost under the Nazis were to be regarded as the sole basis for eligibility, no mention of discrimination would have been included in the Act; residence in Nazi Germany would automatically qualify one for return. See *Matter of Maeda*, Docket No. 1343, Title Claim No. 45628, decision of the Director, February 3, 1954. On the contrary, a cautious and limited program of return was intended for the benefit of certain minorities of the German population who were not in favor of the Nazi cause. See House Hearings on H. R. 5089, 79th Cong., 2d Sess., p. 81; Senate Hearings on S. 2039, 79th Cong., 2d Sess., p. 10. Congress did not give this Office complete discretion to determine a claimant's anti-Nazi attitude. A claimant's denial of civil rights, *discriminatorily*, was made the test and measure of his non-adherence to the Nazi cause.

The denial of civil rights here involved is the loss of religious freedom. Since that loss was the lot of all Germans (or at least 95 percent of Germans), it follows that no discrimination was practiced, but that all Germans suffered the same loss.

It is admitted that claimant was an outspoken anti-Nazi. In fact, her personality was so vigorous that she was called the "only male descendant" of Bismarck.[8] But anti-Nazism is insufficient to establish eligibility. As the Director concluded in the *Matter of Dietrich*, Docket No. 1645, Claim No. 37849, decision dated August 11, 1955, Congress did not intend to include in the phrase, "political group," a group of individuals so amorphous and so large. This is clearly shown by the description of the group of conspirators who met at the claimant's home.

[8] Dulles, *Germany's Underground* (1947), p. 4.

It included members of the military, former political officials, diplomatic and ministerial functionaries, labor leaders, representatives of the church, professional men, Socialists, trade unionists, pro-Anglo-American advocates, and pro-Russian adherents.[9] Thus, while we may admire and applaud the claimant's individual courage and bravery in resisting Nazi encroachments, we may not authorize a return solely because of it. The Act is not framed simply for the benefit of those who resisted the Nazis; it provides administrative relief for those who were persecuted by the Nazis, and, only then, as a result of laws discriminating against a well-defined political, racial or religious group within the German community.

PROPOSED CONCLUSIONS OF LAW

From the findings of fact proposed above, I propose the following conclusions of law:

1. Claimant, Hannah von Bredow, and her children, were, at all times relevant to this proceeding, citizens of Germany and present in Germany.

2. Claimant and her children have not failed to enjoy full rights of citizenship as a result of any law, decree or regulation of Germany discriminating against political, racial or religious groups.

3. Claimant and her children are not eligible for the return of vested property under section 32(a)(2)(D).

ACCORDINGLY, it is recommended that Title Claim No. 42152, Docket No. 54 T 70, be disallowed.

HARRY R. HINKES
Hearing Examiner

February 28, 1956

[9] Dulles, op. cit.

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
OFFICE OF ALIEN PROPERTY
WASHINGTON, D. C.

Title Claim No. 42152
Docket No. 54 T 70

In the Matter of:

HANNAH VON BREDOW, ET AL.

Decision of Deputy Director

On February 28, 1956, Hearing Examiner Harry R. Hinkes issued a recommended decision disallowing this claim.

The Hearing Examiner's recommendation of disallowance is hereby adopted, and the claim is disallowed.

/s/ PAUL V. MYRON
Paul V. Myron
Deputy Director
Office of Alien Property

August 12, 1957

OFFICE OF ALIEN PROPERTY

Title Claim No. 42152
Docket No. 54 T 70

In the Matter of:

HANNAH VON BREDOW, ET AL.

Order of the Attorney General on Review

This matter is before me pursuant to my order granting review "as to the question whether claimants have estab-

lished their eligibility for a return of vested property under the proviso to § 32(a)(2)(D) of the Trading with the Enemy Act, as amended, relating to discrimination against political, racial, or religious groups." The issue is whether the decision of the Deputy Director of the Office of Alien Property adopting the Hearing Examiner's recommended decision disallowing the claim is correct.

It is not contended that claimants are eligible on racial grounds. Their argument is that they are eligible on political and religious grounds. The Hearing Examiner concluded that claimants failed to establish eligibility on either of those grounds.

I have given this case the most careful and earnest consideration. I am not persuaded, however, that the Hearing Examiner's decision was erroneous. While the record demonstrates that claimants were courageous and faithful communicants of the Confessional church and under official pressure to renounce their allegiance to that church, it does not establish that they were denied full rights of citizenship within the meaning of the statute. It is also clear from the record that Mrs. von Bredow was an ardent and outspoken anti-Nazi. Although the circumstances are most appealing, the difficulty is that as a matter of law she was not a member of a "political group" within the meaning of the statute.

Accordingly, the decision disallowing the claims is affirmed.

WILLIAM P. ROGERS
Attorney General

Dated: June 8, 1959

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BRIEF FOR THE PETITIONER

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 319

WALTER SCHILLING,

Petitioner,

v.

WILLIAM P. ROGERS, Attorney General,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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MISCELLANEOUS CITATIONS

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 12) is reported at 268 F. 2d 584.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered May 21, 1959 (R. 14). The petition for certiorari was filed August 18, 1959 and granted October 26, 1959. The jurisdiction of this Court rests on the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C. § 1254(1), 28 U.S.C.A. § 1254(1).

The Statutes Involved

The statutes which the case involves are

(1) the Trading with the Enemy Act, approved October 6, 1917, 40 Stat. 411, as amended, 50 U.S.C. App. § 1 *et seq.*, 50 U.S.C.A. App. § 1 *et seq.*, particularly § 2, 40 Stat. 411, the fourth paragraph of § 7(c) which was added thereto by the Act of November 4, 1918, c. 201, 40 Stat. 1020, § 9(a), 40 Stat. 419, § 32, added thereto by the Act of March 8, 1946, c. 83, 60 Stat. 50 and as amended by the Act of August 8, 1946, c. 878, § 2, 60 Stat. 930, and § 39, which was added thereto by the Act of July 3, 1948, c. 826, § 12, 62 Stat. 1246;

(2) §§ 10 and 12 of the Administrative Procedure Act, 60 Stat. 243, 244, 5 U.S.C. §§ 1009, 1011, 5 U.S.C.A. §§ 1009, 1011;

(3) the Declaratory Judgment Act, as amended August 28, 1954, c. 1033, 68 Stat. 890, 28 U.S.C. § 2201 (Supp. V), 28 U.S.C.A. § 2201; and

(4) Act of June 25, 1948, c. 646, 62 Stat. 930, 28 U.S.C. § 1331, 28 U.S.C.A. § 1331, in effect at the time of the commencement of petitioner's suit on July 8, 1958 and prior to July 25, 1958, when Section 1, Public Law 85-554, 72 Stat. 415, which increased the requisite jurisdictional amount, was approved.

The relevant provisions of the statutes are set forth in the Appendix, *infra*, pages 41-49.

Questions Presented

1. Whether the charge in the complaint, which is admitted by the Attorney General's motion to dismiss, that the decision of the Director of the Office of Alien Property

(and the Attorney General) finding that the petitioner, a non-hostile enemy during World War II, is ineligible to be considered for return of vested property under §§ 32 (a)(2)(D) and 32(a)(5) of the Trading with the Enemy Act was illegal, without substantial evidence on the record to support it, arbitrary and capricious, presents a justiciable controversy within the jurisdiction of the District Court for the District of Columbia.

2. Whether the District Court for the District of Columbia has jurisdiction under the Administrative Procedure Act, the Declaratory Judgment Act, or under the grant of federal-question jurisdiction to the District Courts of a suit to review and set aside a decision of the Director of the Office of Alien Property (and the Attorney General) finding that the petitioner does not qualify under the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act for return of vested property, which decision is admitted by the Attorney General's motion to dismiss to be illegal, without substantial evidence on the record to support it, arbitrary and capricious.

3. Whether the petitioner's suit in the District Court to review and set aside the decision of the Director of the Office of Alien Property (and the Attorney General) finding that petitioner is not within a class of persons eligible for return of vested property under the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act is forbidden by the fourth paragraph of § 7(c) of said Act which provides that the "sole relief and remedy" of any person having any claim to vested property "shall be that provided by the terms of this Act."

Statement of the Case

This is not a suit to recover property vested by the Alien Property Custodian. The suit seeks a judicial review of a decision of the Director of the Office of Alien Property

(and the Attorney General) that petitioner is not eligible to be considered for return of vested property under the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act (Appendix, pp. 44-45).

The Attorney General moved to dismiss the complaint on the ground that the District Court does not have jurisdiction to review administrative action under § 32 (R. 8). The District Court denied the motion (R. 9). An interlocutory appeal was allowed under the provisions of Public Law No. 85-919 approved September 2, 1958, 72 Stat. 1770, 28 U.S.C. § 1292(b), 28 U.S.C.A. § 1292(b) (R. 10). The Court of Appeals reversed the order of the District Court and remanded the case with directions to dismiss the complaint for lack of jurisdiction (R. 14) upon the ground that determination of eligibility for return under the first proviso of § 32(a)(2)(D) is "of a sort committed by Congress to agency discretion" and, therefore, § 7(c) of the Trading with the Enemy Act forbids the suit (R. 13).

The allegations of the complaint (R. 3), which are admitted by the motion to dismiss, are, in substance, as follows:

The petitioner has always been and still is a resident and citizen of Germany. By three vesting orders, effective respectively, August 17, 1942, December 8, 1947 and October 20, 1948, the then Alien Property Custodian seized certain property in which petitioner had an interest. The vested property has been liquidated and $68,537.26 represents petitioner's share of the proceeds (R. 3-4).

On August 8, 1946, Congress amended § 32(a)(2)(D) by providing that vested property may be returned to an individual who, although a citizen and resident of Germany during World War II, did not enjoy full rights of German citizenship as a consequence of a German law, decree or regulation discriminating against political, racial or religious groups, and such return is also determined to

be in the interest of the United States as required by § 32(a)(5) (R. 5). (This requirement was part of § 32 as originally enacted.)

The provisions of § 32(a)(2)(D), as so amended, do not permit the Alien Property Custodian or the Attorney General (for whom the Director of the Office of Alien Property acts) any discretion in determining the eligibility of a former owner of vested property for the return of such property or the proceeds thereof, but only permit discretion in making a return to the former owner once eligibility or qualification has first been affirmatively determined (R. 5).

Petitioner was denied admission to the practice of law, which was a substantial deprivation of his rights as a German citizen, because he was a known opponent of Nazism and considered politically unreliable, and Anti-Nazis or Non-Nazis such as petitioner were recognized and treated as a political group by Nazi authorities and under Nazi laws (R. 5).

On July 26, 1948, deeming himself eligible and qualified for return of vested property under § 32(a)(2)(D), petitioner filed his claim for return. Thereafter a hearing was conducted in the Office of Alien Property before a Hearing Examiner, and the question presented at the hearing was whether petitioner was eligible for return of vested property under § 32(a)(2)(D) (R. 5-6).

The Hearing Examiner rendered a decision concluding that petitioner was eligible for the return of vested property because he failed to enjoy full rights of German citizenship during the period of hostilities as a consequence of German laws, decrees or regulations discriminating against a political group and recommended allowance of the claim (R. 6).

The Director of the Office of Alien Property rejected the Hearing Examiner's recommendation, determined that petitioner was not a member of a "political group" that was discriminated against within the meaning of § 32(a)

(2)(D), and concluded that he was ineligible for return of the vested property. He accordingly disallowed the claim (R. 6). The Attorney General decided not to review and thereupon the Director's decision became final administratively (R. 7).

The complaint specifically alleges in paragraph 17 (R. 6) that the Director's decision

> "misconceived and was not in accordance with and short of the applicable law and was illegal and erroneous in that there was no legal substantial evidence on the record as a whole to support said decision, and was unreasonable, arbitrary and capricious and in express disregard of the object and purpose of Congress to make eligible for the return of vested property those former owners who failed to enjoy full rights of citizenship throughout the period of hostilities as a result of laws of their governments discriminating against political groups."

It is further alleged that petitioner has exhausted his administrative remedy, that there is an actual controversy between him and the Attorney General as to petitioner's eligibility for a return under § 32(a)(2)(D), that should the Director's decision remain final the purpose of Congress as expressed in said section will be circumvented and destroyed, and that no statute precludes judicial review of the decision (R. 7).

The complaint prayed a review of the Director's decision and the action of the respondent in sustaining the decision and a decree setting aside the Director's decision as unlawful, adjudging that petitioner is eligible for the return of his vested property, and directing respondent to determine whether or not a return to petitioner of the property is in the interest of the United States (R. 7-8).

Summary of Argument

I. § 32, as originally added to the Trading with the Enemy Act on March 6, 1946, authorized the return to "technical" enemies of their former property which had been vested for protective purposes. To insure protection of the interests of the United States in those situations in which there was cloaking of enemy interests through "technical" enemies and to bar a return to a "technical" enemy where insufficient reciprocal protection had been afforded by a foreign country of which the former owner was a citizen or subject to American citizens having claims against it, a provision was incorporated requiring, as a condition precedent for return, a determination that such return is in the interest of the United States.

On August 8, 1946, § 32 was amended by the addition thereto of the first proviso of § 32(a)(2)(D) providing for the return of their vested property to enemies who failed to enjoy full rights of citizenship throughout the period of World War II hostilities as a result of laws of their government discriminating against political, racial, or religious groups. Such persons were deemed non-hostile enemies. The first proviso sets forth a condition of *status* which, if occupied by petitioner, entitles him to a determination of eligibility for return.

II. The motion to dismiss concedes the truth of the allegations of the complaint that petitioner was denied admission to the practice of law, a substantial deprivation of his rights as a German citizen, because he was a known opponent of Nazism and considered politically unreliable and that Anti-Nazis or Non-Nazis, such as petitioner, were recognized and treated as a political group by Nazi authorities and under Nazi laws (R. 5). Thus the respondent admits that petitioner occupies the condition of *status* set forth in the first proviso of § 32(a)(2)(D).

The motion also admits the charge in the complaint that the Director's determination that petitioner was not a member of a political group that was discriminated against and concluding that petitioner is ineligible for return of his vested property was not in accordance with the applicable law, illegal, unsupported by substantial evidence, arbitrary and capricious.

III. The Director, Office of Alien Property, is not an autocrat free to act as he pleases in the consideration of petitioner's eligibility for return of his vested property amounting to some $68,000, under § 32, and petitioner, as a matter of law, presumptively has a right of access to the District Court for a review of the Director's decision to determine its validity. § 10 of the Administrative Procedure Act restates in exact statutory language this presumptive right of judicial review as expounded by this Court. Agency action, findings or conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or unsupported by substantial evidence is defined by the Administrative Procedure Act to be a "legal wrong" and deemed unlawful. § 10 provides that except so far as statutes preclude judicial review or agency action is committed by law to agency discretion, any person suffering a "legal wrong" because of agency action shall be entitled to judicial review thereof.

IV. Judicial review of the Director's decision is not precluded by any statute. § 32 of the Trading with the Enemy Act does not on its face preclude it. § 7(c) of that Act, which the Court of Appeals held forbade this suit, does not preclude the judicial review sought by petitioner for the "sole relief and remedy" provision of § 7(c), as this Court has held, relates to property whose seizure and ultimate retention was not authorized by the Trading with the Enemy Act and for whose recovery by a non-enemy an express statutory remedy was provided by § 9(a) of the Act. There is nothing in § 7(c) which precludes peti-

tioner, ineligible to sue for recovery of vested property under § 9(a) because he is an enemy, but eligible for return under the first proviso of § 32(a)(2)(D), from resorting to the District Court for a judicial review of the admittedly illegal decision of ineligibility for return and for which no other remedy is available to him under the Trading with the Enemy Act. Since he has no remedy under that Act, he clearly has a right of judicial review under § 10(c) of the Administrative Procedure Act, which provides that every agency action "for which there is no other adequate remedy in any court shall be subject to judicial review."

V. The agency action sought to be reviewed is not committed by law to agency discretion. A determination of eligibility for return under the first proviso of § 32(a)(2)(D) is not left to the Director's judgment. His function is to find petitioner eligible for return if petitioner comes within the standards fixed by Congress in the first proviso. Assuming, but without conceding, that the Director has discretion, nevertheless, the exercise of discretion does not negative the right to judicial review, and § 10(e)(B)(1) of the Administrative Procedure Act authorizes review for an abuse of discretion. Whether agency action allegedly based upon an exercise of discretion should be set aside by a court after a hearing on the merits and examination of the administrative record is a different question from whether a court may review the agency action for the purpose of determining its validity.

VI. In any event, and apart from the Administrative Procedure Act, a justiciable controversy over a federal statute is presented by the allegations of the complaint, and the District Court has jurisdiction under the general grant of federal-question jurisdiction. Furthermore, since an actual controversy between petitioner and respondent with respect to petitioner's *status, viz.*, eligibility for return is involved, the District Court has jurisdiction to declare such status under the Declaratory Judgment Act.

VII. The authorities relied upon by the Court of Appeals were suits to recover vested property and manifestly inapplicable here. They are also factually distinguishable from this case.

ARGUMENT

I

As respondent's motion to dismiss admits that the Director's decision was illegal, unsupported by substantial evidence, arbitrary and capricious, petitioner has a presumptive right to secure a judicial review of its validity and such presumptive right has been codified by the Administrative Procedure Act.

(a) *The motion to dismiss admits, as a matter of law, the charge in the complaint.*

The complaint charged (R. 6) that the Director's determination that petitioner was not a member of a political group that was discriminated against and is ineligible for return under the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act

> "was illegal and erroneous in that there was no legal substantial evidence on the record as a whole to support said decision, and was unreasonable, arbitrary and capricious * * *."

As a matter of law these allegations are admitted by the motion to dismiss.

In *The Chicago Junction Case*, 264 U. S. 258, which held that an order of the Interstate Commerce Commission permitting a railroad company to acquire control of another is void and may be set aside when the Commission's finding that such an acquisition will be for the interest of the public is unsupported by evidence, Mr. Justice Brandeis said (p. 262):

"Plaintiffs contend that the order is void because there was no evidence to support the finding that the acquisition of control of the terminal railroads by the New York Central 'will be in the public interest.' The bill charges, in clear and definite terms, that this finding was wholly unsupported by evidence. We must take that fact as admitted for the purposes of this appeal."

and again (p. 265):

"The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion to consider the other grounds of invalidity asserted by plaintiffs."

In *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, Mr. Justice Burton, who announced the Court's judgment, remanded the cases to the District Court with instructions to deny the defendant's motion to dismiss the complaints upon the ground that the Attorney General by demurring to the complaints had admitted the allegations that his action in listing the plaintiff organizations as "Communist" had been arbitrary.

(b) *Petitioner has a presumptive right to a judicial review of the illegal decision.*

Chief Justice Hughes in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 277, said:

"• • • A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the

> authority conferred. And an inquiry into the fac
> before the Commission, in order to ascertain whethe
> its findings are thus vitiated, belongs to the judici
> province and does not trench upon, or involve the e
> ercise of, administrative authority."

In *Harmon* v. *Brucker*, 355 U. S. 579, a proceeding t review the legality of actions of the Secretary of the Arm in issuing to inductees a discharge certificate in form othe than "honorable" because of the inductees' preinductio activities, the Court of Appeals for the District of Colum bia Circuit had dismissed on the ground that there wa no review jurisdiction. This Court reversed, finding tha review was available and that, on the merits, the Secre tary's action was *ultra vires*. This Court said (pp. 58 582):

> "Generally, judicial relief is available to one wh
> has been injured by an act of a government offici
> which is in excess of his express or implied power
> *American School of Magnetic Healing* v. *McAnnult*
> 187 U. S. 94, 108; *Philadelphia Co.* v. *Stimson*, 23
> U. S. 605, 621-622; *Stark* v. *Wickard*, 321 U. S. 28
> 310. The District Court had not only jurisdiction t
> determine its jurisdiction but also power to constru
> the statutes involved to determine whether the re
> spondent did exceed his powers. If he did so, hi
> actions would not constitute exercises of his admin
> istrative discretion, and, in such circumstances a
> those before us, judicial relief from this illegalit
> would be available."

Most recently, in *Leedom* v. *Kyne*, 358 U. S. 184, whic held that the Court of Appeals for the District of Columbi Circuit "was right in holding" that the District Court ha jurisdiction of the suit to set aside a certification of th National Labor Relations Board made in excess of it powers. Mr. Justice Whittaker, writing for this Cour

said (p. 190):

> "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers. Cf. *Harmon* v. *Brucker*, 355 U. S. 579; *Stark* v. *Wickard*, 321 U. S. 288; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94."

See, Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 401, 423 (1958).

(c) *§ 10 of the Administrative Procedure Act, enacted on June 11, 1946, is a codification of the presumptive right to judicial review of illegal agency action as expounded in the above cases.*

The memorandum of the Department of Justice contained in S. Doc. No. 248, 79th Cong., 2d Sess., at 415, states the following:

> "Section 10 [Administrative Procedure Act] as to judicial review does not, in my view, make any real changes in existing law. This section in general declares the existing law concerning judicial review. It is an attempt to restate in exact statutory language the doctrine of judicial review as expounded in various statutes and as interpreted by the Supreme Court. I know that some agencies are quite concerned about the phraseology used in section 10 for fear that it will change the existing doctrine of judicial review which has been settled for the particular agency concerned. I feel sure that should this section be given the interpretation which is intended, namely, that it is merely a restatement of existing law, there should be no difficulty for any agency. We may in a sense look at section 10 as an attempt by Congress to place into statutory language existing methods of review."

§ 10 provides that, except so far as statutes preclude judicial review, or agency action is by law committed to

agency action 'involves' an element of discretion or judgment. Whether the court should set aside an agency action founded upon the exercise of discretion and judgment is, as we have said, a totally different question from whether the court may review the action for purposes of determining its validity."

In *Adams* v. *Witmer*, 271 F. 2d 29 (9th Cir.), *aff'd on rehearing*, 271 F. 2d 37, the Court, in discussing whether judicial review of agency action "by law committed to agency discretion" is precluded by § 10 of the Administrative Procedure Act, said upon the authority of *Jilmovich* v. *Chapman*, *supra*, that (p. 33):

"The exercise of discretion by the agency does not in itself negative the right to judicial review."

In denying the petition for rehearing, the Court further said (p. 38):

"* * * But the Administrative Procedure Act was enacted to bring 'the decision of controversies * * * back into the judicial system.'"

(d) *§ 32 does not on its face preclude judicial review.*

In the report of the Senate Judiciary Committee, S. Rep. No. 752, 79th Cong., 1st Sess., reprinted in S. Doc. No. 248, 79th Cong., 2d Sess., at page 212, the following is found with respect to § 10 of the Administrative Procedure Act:

"Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board."

The same statements appear in H. Rep. No. 1980, 79th Cong., 2d Sess., reprinted in S. Doc. No. 248, *supra*, at page 275. This report then states the following:

> "* * * To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review."

Congressman Walter, one of the House sponsors of the Act, said on the floor of the House on May 24, 1946 (S. Doc. 248, *supra*, at p. 368):

> "Two general exceptions are made in the introductory clause of section 10. The first exempts all matters so far as statutes preclude judicial review. Congress has rarely done so. Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial review would be completely immaterial—see *Stark* v. *Wickard* (321 U. S. 288 at p. 317)."

Furthermore, § 12 of the Administrative Procedure Act provides that:

> "* * * No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation *shall do so expressly.*" (Emphasis supplied)

This Court, in *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, and *Brownell* v. *We Shung*, 352 U. S. 180, held that the purpose of §§ 10 and 12 of the Administrative Procedure Act was to remove obstacles to judicial review of agency action under subsequently enacted statutes. This Court said in

Brownell v. *We Shung* (p. 185):

> "* * * Furthermore, as we pointed out in Pedreiro, such a 'cutting off" of judicial review 'would run counter to § 10 and § 12 of the Administrative Procedure Act.' [349 U. S. at 51] 'Exemptions from the * * * Administrative Procedure Act are not lightly to be presumed,' *Marcello* v. *Bonds*, 349 U. S. 302, 310, and unless made by clear language or supersedure the expanded mode of review granted by that Act cannot be modified."

The first proviso of § 32(a)(2)(D) was added to § 32 on August 8, 1946, when the Administrative Procedure Act was already in effect, having been enacted on June 11, 1946. Since Congress did not expressly provide that judicial review of a determination of *status* under the first proviso is precluded, it is manifest that Congress, which had shortly before enacted the Administrative Procedure Act, did not intend to bar non-hostile enemies, such as petitioner, from access to the District Court to test the validity of an illegal decision by the Director with respect to their eligibility for return of their former property.

III

Apart from § 10 of the Administrative Procedure Act, since an actual controversy between petitioner and respondent with respect to petitioner's status, viz., eligibility for return under the first proviso of § 32(a)(2)(D), is presented by the charge in the complaint, the District Court also has jurisdiction to declare such status under its general jurisdiction and the terms of the Declaratory Judgment Act.

(a) *A justiciable controversy is presented under a law of the United States within the District Court's general jurisdiction.*

In *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, an action to set aside an order of the Interstate Commerce Commission, in which the United States was also made a defendant because of a statutory requirement, the District Court, composed of three judges, in dismissing the complaint without reaching the merits on the theory that the government could not sue itself (pp. 429, 430) "also indicated its belief that a three-judge court was without jurisdiction of the suit."

In reversing the District Court on a direct appeal, this Court referred to the complaint as follows (p. 429):

> "The complaint charged that the Commission's conclusions were not supported by its findings, that the findings were not supported by any substantial evidence, that the order was based on a misapplication of law and was 'otherwise arbitrary, capricious and without support in and contrary to law and the evidence.'"

In holding that "the established principle that a person cannot create a justiciable controversy against himself has no application here", this Court said (p. 431):

> "But the Government charged that the order was issued arbitrarily and without substantial evidence. This charge alone would be enough to present a justiciable controversy. *Chicago Junction Case*, 264 U. S. 258, 262-266."

Here, too, the charge in the complaint that the Director's decision was illegal, unsupported by substantial evidence, arbitrary and capricious presents a justiciable controversy.

Moreover, the complaint alleges, and the motion to dismiss admits, (1) that petitioner was denied admission to the practice of law, a substantial deprivation of his rights as a German citizen, because he was a known opponent of Nazism and considered politically unreliable, and Anti-Nazis or Non-Nazis, *such as petitioner*, were recognized

agency discretion, any person "suffering legal wrong" because of any agency action shall be entitled to judicial review thereof.

The report of the Senate Judiciary Committee on the Act, S. Rep. No. 752, 79th Cong., 1st Sess., reprinted in S. Doc. No. 248, at 185, defines "legal wrong", as used in § 10(a), in the following language, at page 212:

> "* * * The phrase 'legal wrong' means such a wrong as is specified in subsection (e) of this section."

The same definition of "legal wrong" is contained in the report of the House Judiciary Committee, H. Rep. No. 1980, 79th Cong., 2d Sess., 233, reprinted in S. Doc. No. 248.

§ 10(e) specifies as unlawful any agency action, findings or conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or unsupported by substantial evidence.

Indeed, the Appendix to the letters of Mr. Justice Clark (then Attorney General), dated October 19, 1945, to Senator McCarran (then Chairman of the Senate Judiciary Committee) and Congressman Sumners (then Chairman of the House Judiciary Committee), reprinted in S. Doc. No. 248, *supra*, pages 223 and 406, states that any person "suffering legal wrong because of any agency action * * * shall be entitled to judicial review of such action", and that this "reflects existing law", referring to the *Chicago Junction* case, *supra*, as a case having an important bearing on this subject (pp. 230, 413).

In view of the respondent's admission that the Director's decision was illegal, arbitrary and capricious, and without substantial evidence on the record as a whole to support it, it is clear that respondent concedes that petitioner has thereby suffered a "legal wrong" within the meaning of § 10(a).

Furthermore, § 10(c) of the Act provides that

> "Every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."

Since petitioner is a non-hostile enemy, he has no remedy under § 9(a) of the Trading with the Enemy Act, which may be availed of only by non-enemies (*Societe Internationale, etc.* v. *Rogers*, 357 U. S. 197, 211, and cases cited), and, since no adequate remedy is afforded him under the Trading with the Enemy Act to review the Director's determination that he is not eligible under the first proviso of § 32(a)(2)(D) to receive a return of his vested property, it is clear that § 10(c) alone affords petitioner a judicial review of such determination.

Thus the Act clearly authorizes the judicial review which petitioner seeks as to the validity of the Director's decision. Mr. Justice Douglas discussed and espoused judicial review afforded by the Act in *We the Judges* (Doubleday, 1956), at pages 168, *et seq.* and Mr. Justice Clark (then Attorney General) in the Appendix to his letters above referred to said (S. Doc. No. 248 at 414):

> "* * * the Act is intended to express general standards of wide applicability. It is believed that the courts should as a rule of construction interpret the Act as applicable on a broad basis, unless some subsequent act clearly provides to the contrary."

In discussing the Act Mr. Justice Jackson, in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 40-41, said:

> "The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It

contains many compromises and generalities and, no doubt, some ambiguities.

"Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear."

Indeed, the Attorney General has determined that a § 32 proceeding is governed by the Act for, as pointed out by the Chief Hearing Examiner of the Office of Alien Property in *Matter of Hans Kroch, et al.* (40 Consolidated Claims), Docket No. 183, at page 170:

"• • • On May 18, 1955 the Attorney General determined in agreement with the Chairman of the Civil Service Commission that the hearing and decision of claims under Section • • • 32 • • • of the Trading with the Enemy Act must be conducted in accordance with the requirements of the Administrative Procedure Act • • •."

Whether the Director applied the legislative standard for eligibility for return of vested property specified in the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act, whether he acted within the authority conferred, whether there was substantial evidence to support his decision and whether the decision is arbitrary or capricious or otherwise not in accordance with applicable law, are questions for judicial decision, especially where, as here, the finding of the Hearing Examiner and the Director as to petitioner's status are in conflict.

Universal Camera Corp. v. *National Labor Relations Board*, 340 U. S. 474;

In re *United Corporation*, 249 F. 2d 168 (3d Cir.).

See, also:

Estep v. *United States*, 327 U. S. 114;
Stark v. *Wickard*, 321 U. S. 288;
Federal Radio Commission v. *Nelson Bros., B. & M. Co.*, 289 U. S. 266, 276-277;
Fleming v. *Moberly Milk Products Co.*, 82 U. S. App. D. C. 16, 160 F. 2d 259, 265.

II

§32 of the Trading With the Enemy Act does not permit any discretion in determining eligibility for return of vested property and does not preclude judicial review of the Director's decision.

(a) *The Congressional intent in enacting Section 32 of the Act after World War II.*

By Section 12 of the Act, 40 Stat. 423, 50 U.S.C. App. § 12, 50 U.S.C.A. App. § 12, property owned by "enemies" and therefore not subject to recovery under Section 9(a) was reserved for disposition "[a]fter the end of the war • • • as Congress shall direct."

The amendment of Section 5(b) of the Act by Title III of the First War Powers Act of December 18, 1941, 55 Stat. 841, 50 U.S.C. App. § 5(b), 50 U.S.C.A. App. § 5(b), authorized the vesting of any property or interest of any foreign country or national thereof. Therefore, the Custodian seized, for protective purposes, property belonging to persons who were not citizens of enemy countries but who were resident in enemy or enemy-occupied territory. Since there was no longer any justification after World War II for retaining property which belonged to nationals of friendly countries, but who were "technical" enemies during World War II, Congress amended the Trading with the Enemy Act by adding thereto § 32 authorizing the return to its former owners of property which was

owned at the time of vesting by certain categories of foreign nationals who were never hostile to the United States, including nationals of countries occupied by the enemy whose property was vested only for protective purposes, and also authorizing the restoration of property to American citizens in those situations where technical authority to vest existed because of the claimants' former residence in enemy or enemy-held territory, but where there was no present reason for retention. (H. Rep. No. 1269, 79th Cong., 1st Sess.)

Since it was well known that German property was cloaked through "technical" enemies, § 32(a)(5) was incorporated as a safeguard to "insure protection of the interests of the United States in seeing to it that returns" would not be made "in situations in which cloaking of enemy interests may have occurred" (Statement of Willard L. Thorp, then Deputy to Assistant Secretary of State Clayton, Hearing before Subcommittee No. 1 of the House Committee on the Judiciary, 79th Cong., 1st Sess. on H. R. 3750, September 12, 1945) and "to bar a return to a 'technical' enemy where in the judgment of the State Department, for example, insufficient reciprocal protection had been afforded by a foreign country to American citizens having claims against it" (H. Rep. No. 1269, 79th Cong., 1st Sess., at page 6, reprinted in 1946 U. S. Code Cong. Serv. 1101, 1105).

(b) *The Congressional intent in amending, on August 8, 1946, Section 32(a)(2)(D) by adding thereto the first proviso thereof.*

By the Act of August 8, 1946, c. 878, § 2, 60 Stat. 930, Congress amended § 32(a)(2)(D) by providing for the return of vested property to an individual who, although a citizen and resident of Germany during World War II, did not enjoy full rights of German citizenship as a consequence of a German law, decree or regulation discriminating against political, racial or religious groups.

John Ward Cutler, associate general counsel, Office of Alien Property Custodian, who testified on July 1, 1946, before the Subcommittee of the Committee on the Judiciary of the United States Senate, 79th Cong., 2d Sess., which then had before it S. 2039, to amend § 32(a), and S. 2378, to amend the First War Powers Act, 1941, 55 Stat. 838, pointed out to the Subcommittee (Hearings p. 12) that it was intended by the proposed amendment to release vested property "in the case of victims of Axis oppression who were deprived of life or civil rights by discriminatory legislation against *political*, racial, or religious *groups* in the country * * * of which they were nationals", and that it was intended by the proposed amendment to release vested property where the former owner thereof "opposed the Nazi cause" and was, in fact, persecuted by the Germans, but that by the proposed amendment "there will be no return to anybody who was in fact in favor of the Nazi cause". (Emphasis supplied)

In Senate Report No. 600, 82d Cong., 1st Sess., on S. 1748, the purpose of the first proviso of § 32(a)(2)(D) is expressed in the following language (at p. 2):

> "On August 8, 1946, the Congress of the United States, by enactment of an amendment to section 32(a)(2) of the Trading With the Enemy Act, sought to provide for the release of property vested in the Alien Property Custodian, where it was apparent that the former owner of the assets was an individual who 'was deprived of life or substantially deprived of liberty pursuant to any law, decree or regulation * * * discriminating against political, racial, or religious groups * * *, in an enemy country.
>
> "By this amendment a necessary and clear-cut distinction was effected between the property of those individuals who were in fact our enemies in the last war, and those who by their extreme persecution at the hands of their governments were the 'enemies of our enemies' and our own allies."

The same statement is found on page 1 of Senate Report No. 784, 81st Cong., 1st Sess., on S. 603, which contains the following (at p. 4):

> "The general approach incorporated in this proposed legislation represents also the only humanitarian one and the only realistic one possible in view of the extraordinary experiences of these persecuted groups over the last 15 years and the extraordinary present-day needs of the survivors. *These victims of persecution, it should be remembered, were treated as a group or 'community'* • • •. Indeed, their property was taken by the United States because they were part of a large political group (i.e., enemy nationals). *To refuse to treat them as a group or community when* there is a possibility of their receiving aid and to emphasize their individuality only when it becomes a barrier to receiving a benefit *is an injustice which the Government of the United States should be avid to avoid.*" (Emphasis supplied)

In House Report No. 2338, 81st Cong., 2d Sess., on S. 603, it is stated (at page 2):

> "The proposed legislation carries out already established policies of this Government. It was passed unanimously by the Senate, during the first session of this Congress.
>
> "The first legislative step in the establishment of these policies was taken on August 8, 1946, when there was enacted into law an amendment to section 32(a)(2) of the Trading with the Enemy Act providing for the return of property vested by the Alien Property Custodian where it appeared that the former owner was an individual who 'was deprived of life or substantially deprived of liberty pursuant to any law, decree or regulation • • • discriminating against political, racial, or religious groups' in an enemy country.

"This amendment established a clear-cut *distinction* between the property of those persons who were in fact our enemies during the last war, and *those who*, as evidenced by their extreme persecution at the hands of their governments, *were in fact the enemies of our enemies. It was thus made clear that the intention of the United States was not to profit from the assets of the latter class of individuals.*" (Emphasis supplied)

In the Final Report of the Senate Subcommittee to Examine and Review the Administration of the Trading with the Enemy Act of the Committee on the Judiciary, pursuant to S. Res. 245, 82d Cong., 2d Sess., as amended by S. Res. 47, 83d Cong., 1st Sess., approved January 30, 1953, and S. Res. 120, approved June 24, 1953, the purpose of the first proviso of Section 32(a)(2)(D) is stated, at page 6, as follows:

> "In 1946, section 32 was added to the act to provide for administrative return of certain vested property. Under this section, citizens of friendly countries who are enemies under section 2 of the act solely because of their residence in enemy-occupied territory, as well as enemy citizens who had been persecuted for political, racial, or religious reasons, can have their former property returned to them."

The Deputy Director of the Office of Alien Property has stated that:

> "... Under [section 32] ... enemy citizens who had been persecuted for political, racial or religious reasons could have their former property returned to them." (Hearings, Administration of the Trading with the Enemy Act, 83rd Cong., 1st Sess., p. 104.)

Manifestly, Congress intended that if non-hostile enemies, such as petitioner, come within the standards specified in the first proviso of § 32(a)(2)(D) for determining

their eligibility for return they "can have their former property returned to them."

(c) *§ 32 does not permit any discretion in determining eligibility for return.*

There are two stages in the administrative process under § 32. The first stage is one whereby the Director must make a determination as to whether a claimant comes within a class of persons eligible for return under the first proviso of § 32(a)(2)(D). The second stage is one whereby, after having first determined that a claimant is eligible, the Director must determine under § 32(a)(5) whether a return of vested property to the claimant is in the interest of the United States. The first stage, which is here involved, is not discretionary for if a claimant, such as petitioner, establishes that he failed to enjoy full rights of German citizenship throughout the period of hostilities as a result of German laws discriminating against political, racial or religious groups, the Director, as Congress intended, must determine him to be eligible for return. In such case the Director has no authority to determine him ineligible for return.

Assuming for the discussion, but without conceding, that a determination of eligibility for return under the first proviso of § 32(a)(2)(D) is discretionary, § 10(e) of the Administrative Procedure Act makes manifest that a determination of non-eligibility for return is judicially reviewable for it is there provided that agency action may be held unlawful and be set aside if not only arbitrary, capricious and without substantial evidence to support it, but also for "an abuse of discretion or otherwise not in accordance with law".

Senator McCarran, when he was explaining the provisions of § 10 of the Act on the floor of the Senate on March 12, 1946, was closely questioned by Senator Donnell about this matter and the following colloquy took place (S. Doc.

No. 248, *supra*, p. 311):

"Mr. Donnell: But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

"Mr. McCarran: It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning."

Congressman Walter, one of the House sponsors of the Act, in explaining § 10, said on the floor of the House on May 24, 1946 (S. Doc. No. 248, *supra*, at p. 368):

"* * * There have been much misunderstanding and confusion of terms respecting the discretion of agencies. They do not have authority in any case to act blindly or arbitrarily. They may not wilfully act or refuse to act. Although like trial courts they may determine facts in the first instance and determine conflicting evidence, they cannot act in disregard of or contrary to the evidence or without evidence. They may not take affirmative or negative action without the factual basis required by the laws under which they are proceeding."

In *Homovich* v. *Chapman*, 89 U. S. App. D. C. 150, 153, 191 F. 2d 761, 764, the Court of Appeals said:

"* * * The Administrative Procedure Act (Section 10) forbids judicial review only where statutes 'preclude' such review or where agency action is 'by law committed to agency discretion.' No statute 'precludes' this review, and the Secretary would have us stretch the second prohibitory clause far beyond its meaning. He says that there can be no review where agency action 'involves' discretion or judgment. Obviously the statute does not mean that; almost every

and treated as a political group by Nazi authorities and under Nazi laws (R. 5), and (2) that the Hearing Examiner concluded that petitioner is eligible for the return of vested property under § 32 because he failed to enjoy full rights of German citizenship during the period of hostilities as a consequence of German laws, decrees or regulations discriminating against a political group (R. 6).

In support of the Director's decision, contrary to that of the Hearing Examiner, the respondent has consistently taken the position, as stated at page 12 of his brief in opposition to the petition for certiorari herein, that "the interpretation of Section 32 is within" the authority of the Attorney General or his delegate, and that whether the petitioner was a member of a "political group" which had been discriminated against is "a question of the construction of Section 32", and the fact, as alleged in the complaint, that the Nazis treated Anti-Nazis or Non-Nazis, such as plaintiff, as a political group "does not mean that the petitioner was a member of such a 'group' for purposes of Section 32."

Manifestly, the suit involves a controversy between petitioner and respondent respecting the construction of the first proviso of § 32(a)(2)(D) upon which petitioner's status of eligibility for return of his vested property, amounting to some $68,000, depends. This controversy over a law of the United States is within the general jurisdiction of the District Court.

28 U.S.C. § 1331, 28 U.S.C.A. § 1331;
McGrath v. *Kristensen*, 340 U. S. 162, 169.

In *Bell* v. *Hood*, 327 U. S. 678, 685, this Court said:

> "Thus, the right of the petitioners to recover under their complaint will be sustained if the * * * laws of the United States are given one construction and will be defeated if they are given another. For this reason

the district court has jurisdiction. *Gully* v. *First National Bank*, 299 U. S. 109, 112, 113; *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 199, 200."

Tennessee v. *Davis*, 100 U. S. 257, 264;
Schulthis v. *McDougal*, 225 U. S. 561, 569;
The Fair v. *Kohler Die Co.*, 228 U. S. 22, 25.

In view of the foregoing, petitioner presumptively has a right to a judicial review of the Director's decision and a judicial construction of the first proviso of § 32(a)(2)(D) and, therefore, the District Court has jurisdiction of the suit.

(b) *The District Court has jurisdiction under the Declaratory Judgment Act.*

Mr. Justice Reed, in delivering this Court's opinion in *McGrath* v. *Kristensen*, 340 U. S. 162, said (p. 169):

"We do not find it necessary to consider the applicability of § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C.A. § 1009, to this proceeding. Where an official's authority to act *depends upon the status of the person affected*, in this case *eligibility* for citizenship, *that status*, when in dispute, *may be determined by a declaratory judgment proceeding* after the exhaustion of administrative remedies. Under § 19(c) of the Immigration Act the exercise of the Attorney General's appropriate discretion in suspending deportation is prohibited in the case of aliens ineligible for citizenship. The alien is determined to have a proscribed status by this administrative ruling of ineligibility. Since the adminstrative determination is final, the alien can remove the bar to consideration of suspension only by a judicial determination of his eligibility for citizenship. This is an actual controversy between the alien and immigration officials over the *legal right of the alien to be considered* for

suspension. *As such a controversy over federal laws, it is within the jurisdiction of federal courts*, 28 U.S.C. § 1331, 28 U.S.C.A. § 1331, *and the terms of the Declaratory Judgment Act*, 28 U.S.C. § 2201, 28 U.S.C.A. § 2201." (Emphasis supplied.)

So, here, the Director's authority to act under § 32(a) of the Trading With the Enemy Act, namely, return vested property, "depends upon the status of the person affected, in this case eligibility for" return; "that status, when in dispute, may be determined by a declaratory judgment proceeding after the exhaustion of administrative remedies." Here, too, there "is an actual controversy between" petitioner and respondent "over the legal right of" petitioner "to be considered for" return of his vested property and as "such a controversy over federal laws, it is within the jurisdiction of federal courts * * * and the terms of the Declaratory Judgment Act * * *."

In *McGrath* v. *Kirstensen*, this Court relied upon its prior decision in *Perkins* v. *Elg*, 307 U. S. 325, as appears from the following language in the opinion of Mr. Justice Reed (340 U. S. at pp. 169-171):

> "It was so held in Perkins v. Elg, 307 U. S. 325, where a declaratory judgment action was brought against the Secretary of Labor, then the executive official in charge of deportation of aliens, the Secretary of State, and the Commissioner of Immigration, to settle citizenship status. The Department of Labor had notified Miss Elg, who was not in custody, that she was not a citizen and was illegally remaining in the United States, and the Department of State had refused her a passport 'solely on the ground that she had lost her native born American citizenship'. The District Court sustained a motion to dismiss the proceeding against the Secretary of State because his function as to passports was discretionary, but declared against the contention of the Secretary of Labor

and held that Miss Elg had not lost her American citizenship. On appeal, the Court of Appeals for the District of Columbia affirmed both the dismissal of the Secretary of State from the proceeding and the holding that Miss Elg was a citizen, and also determined that the case was properly brought within the Declaratory Judgment Act. Perkins v. Elg, 69 App. D. C. 175, 99 F. 2d 408. The United States raised no question on its petition for certiorari as to the propriety of the declaratory judgment action. Miss Elg, however, obtained certiorari from the dismissal of the proceeding against the Secretary of State, and the United States defended the judgment of dismissal on the ground that the Declaratory Judgment Act did not add to federal court jurisdiction but merely gave an additional remedy. In the Government's brief it was said judicial jurisdiction would be expanded without warrant 'by permitting the court to substitute its discretion for that of the executive departments in a matter belonging to the proper jurisdiction of the latter.' We rejected that contention and reversed the Court of Appeals on this point, saying, 'The court below, properly recognizing the existence of an actual controversy with the defendants (Aetna Life Ins. Co. of Hartford v. Haworth, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617), declared Miss Elg "to be a natural born citizen of the United States," and we think that the decree should include the Secretary of State as well as the other defendants. *The decree* in that sense *would in no way interfere with the exercise of the Secretary's discretion* with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship.' 307 U. S. 349-350, 59 S. Ct. 884, 896, 83 L. Ed. 1320." (Emphasis supplied.)

Mr. Justice Jackson in his concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123,

cited *Perkins* v. *Elg*, for the following statement (p. 185):

> "The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally."

and said in the footnote:

> "That was an action to mandamus the Secretary of State to issue a passport, to which it was conceded Miss Elg had no legal right, its issuance being wholly within Executive discretion which the courts would not attempt to control. Chief Justice Hughes pointed out, however, that its denial to Miss Elg was not grounded in the Secretary's general discretion but 'solely on the ground that she had lost her native born American citizenship.' Finding that ground untenable, this Court directed its decree against the Secretary. The Secretary might say she would get no passport, *but he could not, for unjustifiable reasons, say she was ineligible for one.*" (Emphasis supplied.)

Here, too, the Director cannot, for unjustifiable reasons, say petitioner is ineligible for return of his vested property.

IV

The amendment of § 7(c) of the Trading with the Enemy Act, adopted November 4, 1918, providing that the "sole relief and remedy" for restoration of property erroneously seized by the Alien Property Custodian as enemy property shall be a suit under § 9(a), does not preclude review by the District Court of the Director's illegal determination of petitioner's status in a proceeding for the benefit of nonhostile enemies under § 32 of the Act, enacted in 1946.

In *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, this Court considered the authority of the Alien Property Custodian with respect to seizures of property determined by him to belong to or to be held for the

benefit of enemies, holding that Section 7(c) of the Act, as amended by the Act of November 4, 1918, requires an immediate transfer of property to the Custodian on demand after he has determined that it is enemy property without awaiting resort to the courts, whether his determination be right or wrong. Mr. Justice Holmes referred to "the sole relief and remedy" provision of Section 7(c) in the following language (at p. 568):

> "* * * By the Act of November 4, 1918, c. 201, 40 Stat. 1020, Section 7(c) was amended among other things by adding after the requirements of transfer 'or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.' This shows clearly enough the peremptory character of this first step. It cannot be supposed that a resort to the Courts is to be less immediately effective than a taking with the strong hand. * * * By a later paragraph 'the sole relief and remedy of any person having any claim to any * * * property' transferred to the Custodian 'or required so to be, or seized by him shall be that provided by the terms of this Act.' The natural interpretation of this clause is that it refers to the remedies expressly provided, in this case by section 9; that property required to be transferred and property seized stand on the same footing, not that the resort by the Custodian to the Courts instead of to force opens to the person who has declined to obey the order of the statute or who has prevented a seizure a right by implication to delay what the statute evidently means to accomplish at once."

In *Commercial Trust Co. of New Jersey* v. *Miller*, 262 U. S. 51, the Alien Property Custodian sued to obtain possession of securities and money belonging to an alien enemy in the hands of a trustee which claimed the right

to have the property interests judicially determined by a court of equity before a right to the possession of the property could be asserted by the Custodian. In affirming an order of the Circuit Court of Appeals which had affirmed a decree of the District Court directing the trustee to transfer the property to the Custodian, this Court, on the authority of *Central Union Trust Co.* v. *Garvan* and *Stochr* v. *Wallace*, 255 U. S. 239, said (at p. 56):

> "Those cases decide, as we have also seen, that the suit is as of peremptory character as 'seizure in pais' and is the dictate and provision for the emergency of war, not to be defeated or delayed by defenses; its only condition, therefore, being the determination by the Alien Property Custodian that it was enemy property. It was recognized that there is implication in the act that mistakes may be made, but it, the act, assumes 'that the transfer will take place whether right or wrong.' In other words, it is the view of the opinions that the act provides for an exercise of government, but also provides, as we have said, redress for mistakes in its exercise by the claimant of the property filing a claim under section 9 * * * which, if not yielded to, may be enforced by suit."

In referring to the amendment to Section 7(*e*) adopted on November 4, 1918, Mr. Justice Cardozo (then Judge) in *Miller* v. *Lautenburg*, 239 N. Y. 132, said (at p. 135):

> "The Trading with the Enemy Act of October 6, 1917 (40 Stat. 411, ch. 106), and Executive Orders made under its authority empower the President or his delegate, the Alien Property Custodian, to make demand for the conveyance or delivery of any property which the President of this said delegate may determine to be enemy owned. Obedience to a de-

mand so made becomes thereupon the duty of the owner or his agent. If the act had been left in this form, there would have been opportunity for argument that upon a refusal of a conveyance or delivery, the Custodian would be helpless without the aid of a judgment of a court. An amendment was accordingly adopted on November 4, 1918 (40 Stat. 1020, ch. 201, § 7c), which clothes the Custodian with the power to seize. Property brought into his possession either through compliance with the demand or through 'a taking with the strong hand' (*Central Union Trust Co. of N. Y.* v. *Garvan*, 254 U. S. 554, 568), he is to hold with the same powers as those of a common-law trustee, including, specifically, the power to dispose thereof by sale or otherwise as if an absolute owner (Trading with Enemy Act, § 12, as amended by the Appropriation Act of March 28, 1918, 40 Stat. 460, ch. 28). The power to sell is subject, indeed, to a single limitation. If a claim for restitution is filed either by the putative enemy or by another, the property, unless returned, must be held by the Custodian intact until the merits of the claim have been judicially determined (*Central Union Trust Co.* v. *Garvan*, *supra*, p. 568; Trading with the Enemy Act, § 9). In default of such a claim, rights and remedies are transferred from the thing itself to the proceeds (§ 7c, as amended November 4, 1918, 40 Stat. 460, ch. 28). These provisions have been upheld by the Supreme Court as a valid exercise of the war power (*Central Union Trust Co.* v. *Garvan*, *supra*; *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Co. of N. J.* v. *Miller*, 262 U. S. 51). Under the rulings of that court the determination by the delegate of the President that the property is enemy owned has the same force as a like determination by the President himself. The determination, though not conclusive, has *prima facie*

a validity that suffices to sustain a transfer of possession. If it is challenged as erroneous, there may be contest and restitution (*Central Union Trust Co. v. Garvan, supra,* p. 567; *Commercial Trust Co. of N. J. v. Miller, supra,* p. 55)."

Thus the Trading with the Enemy Act authorized through executive action speedy capture of all enemy property within the United States, and the Custodian was authorized to take possession of such property by whomsoever it might be held whenever, after investigation, he had determined the property to belong to, or to be held for, or on account of, or for the benefit of, an enemy or ally of an enemy. Congress intended by Section 7(c) that possession of such property should be delivered to the Custodian and litigation had upon non-enemy claims to the property seized after the property had come into the Custodian's possession by a suit against the Custodian under Section 9(a). As stated by Mr. Justice Stone in *Becker Steel Co. of America* v. *Cummings,* 296 U. S. 74, 79:

"Section 7 of the Trading with the Enemy Act conferred on the Alien Property Custodian authority summarily to seize property upon his determination that it was enemy owned, and such a seizure was lawful even though the determination were erroneous. *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554; *Stoehr* v. *Wallace,* 255 U. S. 239; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51. But in thus authorizing the seizure of property as a war measure Congress did not attempt the confiscation of the property of citizens or alien friends. See *Henkels* v. *Sutherland, supra,* 301. Instead by section 9(a) it gave the non-enemy owner the right to maintain a suit for the recovery of the seized property or its proceeds, and at the same time by the all-inclusive language of section 7(c) it denied to him any other remedy."

See:

Guessefeldt v. *McGrath*, 342 U. S. 308, 313, 318;
Clark v. Uebersee Finanz-Korp., 332 U. S. 480, 483;
Societe Internationale, etc. v. *Rogers*, 357 U. S. 197, 211.

These decisions and the provision of Section 7(c) that the "sole relief and remedy" of any person having any claim to vested property "shall be that provided by the terms of this Act" relate to property whose seizure and ultimate retention was not authorized by the Act and for whose recovery by a non-enemy an express statutory remedy was provided by § 9(a). Nothing in them appears to preclude petitioner, ineligible under § 9(a) to sue for the recovery of vested property because he is an enemy within the meaning of § 2 of the Act, but eligible for the return of such property under the first proviso of § 32(a)(2)(D), from seeking judicial review of an admittedly illegal, arbitrary or capricious administrative determination of ineligibility under the first proviso of § 32(a)(2)(D) and for which no other remedy is available under the Trading with the Enemy Act.

V

The decisions of the Court of Appeals in *McGrath* v. *Zander*, 85 U. S. App. D. C. 334, 177 F. 2d 649, and *Legerlotz* v. *Rogers*, 105 U. S. App. D. C. 256, 266 F. 2d 457, involved suits to recover vested property and not, as here, suits seeking a judicial review of a determination of ineligibility for return under the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act, and, therefore, are inapplicable.

In *McGrath* v. *Zander* the suit sought to recover vested property under § 9(a) on the ground that Mrs. Zander was not an "enemy or ally of enemy" within the meaning of § 2 of the Act, not being a "resident within the territory" of Germany at any time during World War II. The

nature of the suit is stated in the opinion (177 F. 2d at 651):

> "The interest of appellee [Mrs. Zander] in said estate * * * was seized and vested in the Alien Property Custodian * * *. The present controversy arises out of Mrs. Zander's suit in the District Court to recover that fund."

She based her claim on an alternative count which rested upon § 32(a), and allegations that she had filed a claim with the Custodian for return of the vested property and, although entitled thereto, the claim had been refused. The District Court assumed jurisdiction under § 10(a) of the Administrative Procedure Act, treating the action taken by the Custodian as a final determination and refusal of the claim. The Court of Appeals held that she was not an "enemy" since she was never "resident within" Germany and that, therefore, she was entitled to recover under § 9(a) of the Act, stating (177 F. 2d at 651) that § 7(c) "limits the means of reclaiming seized property" to the relief or remedy provided by the Act and "the only judicial remedy for reclaiming vested property" is provided by § 9(a).

Furthermore, there was no administrative determination of ineligibility involved, as is apparent from the following excerpts from the Government's brief in the Court of Appeals in that case:

> "Although the court was apparently under the impression that it was reviewing a determination of the Alien Property Custodian that appellee is a citizen or subject of Germany (Joint App. 29), the record does not support such a conclusion. The Custodian *has never made a determination to that effect*, nor has it made any other determination in respect of appellee's claim under Section 32." (p. 3) (Emphasis supplied.)
>
> * * * * *
>
> "The court below erred in concluding that appellee was entitled to a return of property under Section 32 of the Trading With the Enemy Act when findings

No. 319

In the Supreme Court of the United States

OCTOBER TERM, 1959

WALTER SCHILLING, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
DALLAS S. TOWNSEND,
ROBERT KRAMER,
Assistant Attorneys General,
IRVING JAFFE,
GEORGE B. SEARLS,
VICTOR R. TAYLOR,
Attorneys,
Department of Justice, Washington 25, D.C.

explicitly prerequisite to such a return had not been made." (p. 9)

* * * * *

"The court below rested jurisdiction on Section 10 of the Administrative Procedure Act of 1946, but that Act is not applicable. * * * There has been no determination whatsoever of appellee's claim under Section 32, and, *a fortiori*, no final determination." (p. 9)

* * * * *

"The court stated it was reviewing a determination of the Alien Property Custodian that appellee is 'a citizen or subject of Germany within the meaning of Section 32 of the Trading With the Enemy Act.' *No such determination has been made.*" (p. 14) (Emphasis supplied.)

* * * * *

"*No determination of the claim under Section 32 has been made.*" (pp. 14-15) (Emphasis supplied.)

The Court of Appeals recognized, as contended by the Government, that no determination of the claim under § 32 had been made for the opinion states (p. 652):

"We may also add, without extending this opinion by any detailed reference to the record, that in our judgment there was no final determination or refusal of the claim by the Custodian, and no action that can properly be so construed. Hence, at all events, there was no exhaustion of the administrative remedy, an essential condition to judicial review."

In *Legerlotz* v. *Rogers*[1] the plaintiff also sued to recover vested property under § 9(a) of the Trading with the

[1] This Court granted a writ of certiorari in *Legerlotz* v. *Rogers*, No. 213, October Term, 1959. We have been informed by counsel for Legerlotz that the cause will not come on for argument before this Court because an agreement has been reached with the Office of Alien Property for payment in full of his claim.

Enemy Act and the "main issue" in the case was "whether the plaintiff's suit under § 9(a) was timely brought" (266 F. 2d at 458).

It appears from the record of that case in the Court of Appeals that the Attorney General had determined Legerlotz to be eligible for return, had published a notice of intention to return his property, a return order was issued, and after making substantial payments thereunder, the Attorney General, some 6½ years later, published an amended return order, retaining a portion of the property, upon a determination that return of such amount would not be in the interest of the United States by reason of paragraph 6c of the Memorandum of Understanding between the Government of the United States and the Provisional Government of France, known as the Byrnes-Blum Agreement for "Reverse Lend-Lease". Thus, Legerlotz was determined to be eligible for return.

Surely, these decisions upon which the Court of Appeals relied are not applicable authorities here.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed and the cause remanded to that Court with instructions to affirm the order of the District Court denying the respondent's motion to dismiss the complaint.

Respectfully submitted,

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APPENDIX

1. Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App. § 1, *et seq.*, 50 U.S.C.A. App. § 1, *et seq.*:

§ 2. **Definitions**

The word "enemy", as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

* * * *

§ 7. * * *

* * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property

thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * *

§9. **Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover**

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the pay-

ment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United

States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

§ 32. **Return of property**—(a) Conditions precedent The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

* * * * *

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section, was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided*, That notwithstanding the

provisions of this subdivision (D) return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation: • • •

• • • • • •

(5) that such return is in the interest of the United States.

• • • • •

§ 39. • • •

(a) No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act • • •.

2. The Declaratory Judgment Act, as amended August 28, 1954, c. 1033, 68 Stat. 890, 28 U.S.C., § 2201 (Supp. V), 28 U.S.C.A. § 2201:

§ 2201. **Creation of remedy.**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court

of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

3. § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C., § 1009, 5 U.S.C.A. § 1009:

§ 1009. **Judicial review of agency action.**

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings.

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable.

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review.

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review.

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant

questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

4. § 12 of the Administrative Procedure Act, 60 Stat. 244, 5 U.S.C. § 1011, 5 U.S.C.A. § 1011:

§ 1011. Impairment of rights; effect on other laws; separability; subsequent legislation; effective date

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* * * No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly.

5. Act of June 25, 1948, c. 646, § 1, 52 Stat. 930, 28 U.S.C. § 1331, 28 U.S.C.A. § 1331:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.